RESEARCH PROPOSAL

On

Witness Protection in Criminal Trials in India

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WITNESS PROTECTION IN CRIMINAL TRIALS IN INDIA

INTRODUCTION

Commission of a crime is a gradual process and is a culmination of set of events and series of acts. The main aim of criminal justice system is to capture and punish the offender which could be done only after the careful and proper investigation identifying the series of acts. The series at times shift away the focus of investigative machinery as the offender might have manipulated the series to cast away the criminal liability and punishment. The evidence plays a major role in this investigative process.

The instrument of evidence is the media through which the evidence of facts, either disputed or required to be proved, are conveyed to the mind of the investigative agencies and the judiciary in civil as well criminal matters. The evidence before the Court or authority can be documentary evidence or oral evidence. Amongst all these evidences the present research would focus on the role and status of witnesses in the criminal justice system in India and the need for improved witness protection. The oral evidence is generally given by the witnesses, be it a victim himself, the accused or any other person having any information relating to the matter. A witness plays very important role in the criminal trials and helps the court in the administration of justice. It is by means of witnesses that both the documentary and material evidences are usually presented to the Court.

"A witness, in the sense that I am using the word, is a man whose life and faith are so completely one that when the challenge comes to step out and testify for his faith, he does so, disregarding all risks, accepting all consequences."

Whittaker Chambers[1]

The instruments of evidence are the media through which the evidence of facts, either disputed or required to be proved, are conveyed to the mind of the judicial tribunal in civil as well criminal matters.

[1] http://www.brainyquote.com/quotes/keywords/witness visited on 06/02/11

A witness may thus be defined as a person who gives evidence to a judicial tribunal. All quasi judicial tribunals and tribunals of all other kinds receive evidence through witnesses.

Concept of witnesses under ancient Hindu Law:

The *Dharma Sutras* in ancient India go into details as to the time at which and the ways in which witnesses are to be examined and how they are to be tested. The law givers lay down that in the disputed cases the truth shall be established by means of witnesses. But there was a sharp distinction between adduction of oral evidence in civil matters and criminal offences. As pointed out by Mr. B. Guru Rajah Rao insisted on high moral qualification of a witness in civil matters and did not permit anyone being picked from streets or from the court premises and made to depose, as is very common in the modern Indian Court.[1]

Under the ancient Hindu Law of Crimes, there were two forms of proofs which were recognised as valid. The first was Human proof which further includes documents (*lekhya*), witnesses (*sakshi*) and possession (*bhukti*). The second kind of evidence recognised under the law was Divine proof that includes five kinds of Ordeals (divya), ordeal by balance (*ghata*) ordeal by fire (*agni*), ordeal by water (*udaka*), ordeal by poison (*visha*) and ordeal by drinking water (*kosa*).[2] The Human proof is however, preferred over the Divine proof, especially when one of the parties offers a human proof and the other a divine proof. [3]

The witness is important evidence from the point of view of the oral evidence. A witness is a person other than the party who has some knowledge of the transaction in dispute.1 A person becomes a witness according to Manu either because he has seen something or heard something.2Witnesses are of two kinds: (1) *Krita* (chosen); (2) *Akrita* (casual). *Krita* witnesses are of five kinds and *Akrita* witnesses are of 6 kinds. The *Krita* witnesses are (1) *Likhita* (one who has been purposely brought to attest a written instrument). If he is a signatory he is called a *Likhita* or one who can write his name himself. If not he is called *Lekita* (marksman) or one who gets his name written by others. *Smarita*, is one

[1] Mr. B. Guru Rajah Rao, '*Ancient Hindu Judicature*', (Ganesh & Co.) (1920) pg. 60

[2] Mr. B. Guru Rajah Rao, '*Ancient Hindu Judicature*', (Ganesh & Co.) (1920) pg. 58

[3] Ibid pg. 59

who has been asked to witness a transaction and reminded about it every time the transaction takes place. (3) *Yadhrichchagata*, is one who has casually come at the time of the transaction. (4) *Goodha Sakshi* is one who has been asked by the plaintiff to hide himself in some place and to listen to the words of the adversary. (5) *Uttara Sakshi* is one who, having listened to the statement of a person who is about to die or to travel abroad, about some disputed transaction, is called upon to speak to it.

The Akrita witnesses are: 1. the villagers, 2. Judge, 3. King, 4. one who has been authorised to do any act, 5. the person deputed by the plaintiff, 6. members of the family in matters affecting the family. Judge includes the clerk of the Court and the members of the assembly.[1]

The tendency of all ancient legislations was to regulate the competency of witnesses by artificial rules of exclusion, while the trend of modern jurisprudence is to widen the scope of oral testimony, leaving the determination of the credibility to the discretion of the tribunals.

The ancient law givers wisely relaxed these restrictions in case of witnesses of criminal offences, because they recognised crimes might happen in forests and secluded places and could only be spoken of by witnesses who happen to be there, irrespective of qualifications.

In order to create an atmosphere for speaking the truth the whole truth and nothing but the truth by the witnesses, our ancient law givers invested great solemnity to the holding of courts and enjoined that the courts should be decorated with flowers, statutes, painting, and idols of God. Judges wore distinctive robes and sat on high cane seats. The courts were held in the morning and did not work on full moon and new moon days. Before giving evidence the witnesses has to perform ablutions, make a brief Sankalpa, face an auspicious direction and then witnesses were exhorted to speak the truth in most solemn appeals to their strongest religious motives. They were ordered to speak the truth on pain of incurring the sin of all degrading crimes.

The method of examining witnesses set out by Manu is instance on examination in court and in the presence of parties. These are indication that the witnesses were also examined on commission. According to Hindu practice, it was the judge who put questions to witnesses. They were directed to watch the behaviour of the witnesses and decide upon

[1] Mr. B. Guru Rajah Rao, '*Ancient Hindu Judicature*', (Ganesh & Co.) (1920) pg. 58

their reliability. According to Lord Vishnu a false witness may be known by his altered looks, by his countenance, changing colour and by his talk wandering from the subject.

It was open to the opponent to bring to the notice of the court, circumstances disqualifying or discrediting a witness. But this was to be done when the witness was giving evidence. Then the judge would elicit witnesses answer to the objections. The witnesses were not permitted to discredit other witnesses.

In examining witnesses, it was enjoined that the presiding officer of the court should treat them gently and persuasively. If the witness is harshly treated, he might take fright and thus lose the thread of this narrative in its logical sequence. Therefore, severe penalty was enacted for a judge, in the *Arthasastra*, who threatens, browbeats or unjustly silences witnesses or abuses or defames or asks questions which out not to be asked or make unnecessary delay and thus tires parties or helps witnesses by giving them clues. The witnesses were asked questions once and the answer given by the witness is taken in the natural course. The questions cannot be asked to them repeatedly to extract different versions at different times.

The respectable treatment which seems to have been accorded to the witnesses in ancient time must have been sufficient inducement to call forth disinterested witnesses.

It is well admitted by many now a days that a respectable witness try to avoid the witness box. Both witnesses and accused were protected to an extent that a witness should not be compelled to make a statement, which might incriminate him and that in the investigation of criminal cases there was no use of rod or staff to obtain proofs.

The term *sakshi* itself connotes, witnesses could only speak to what they had themselves seen or had heard. In their endeavour to find out the truth, which is the object of all trials, after solemn exhortations to witnesses to speak the truth, it was discontenting to find that perjury from a pious motive is extenuated in certain cases.

Concept of witnesses under ancient Mohammadan Law:

The Al – Quran lays great stress on justice. It holds that the creation is founded on justice and that one of the excellent attributes of God is ‘Just’. Consequently, the conception of justice in Islam is that the administration of justice is a divine dispensation. Therefore, the rules of evidence are advanced and modern.

Under the Mohammedan law the evidence in legal matters is classified as oral and documentary. The oral evidence is sub – divided into direct and hearsay. Witnesses were examined and cross examined separately out of the hearing of the other witnesses. Leading questions were not allowed on the ground that this would lead to suspicion that the court was trying to help one party to prejudice of the other; but if a witness was frightened or got confused, the judge could put such questions so as to remove the confusion, though they may be leading questions. It was enjoined that the judge would be liable to the charge of partiality and he was putting question in order to get answers to fact which aught be proved by the witness.

Certain classes of witnesses were held to be incompetent witnesses, namely, very close relatives in favour of their own kith and kin, or of a partner in favour of another partner. Certain classes of men, such as professional singers and mourners, drunkards, gamblers, infants or idiots or blind persons in matters to be proved by ocular testimony, were regarded as unfit for giving evidence.

Concept of Witness under Modern Law:

The ordinary meaning of the word "witness" is a person present at some event and able to give information about it. A witness is someone who has firsthand knowledge about a crime or dramatic event through their senses (e.g. seeing, hearing, smelling, touching) and can help certify important considerations to the crime or event.

In other words, a witness is a person whose presence is necessary in order to prove a thing or incident. The word witness is nowhere defined in the Code of Criminal Procedure. But a new clause (*wa*) has been inserted in section 2[1] introducing definition of '*victim*' which also includes the guardians and legal heirs of the victim (Victim is considered to be a prime witness in a criminal trial). It is for the first time that the efforts for defining a victim in legislation have been done through this provision. Hence this is a stepping stone in recognizing legislatively the status of a victim as an important component of a trial. Further it has also been liberal enough to acknowledge right of the guardian and legal heir of the victim to claim compensation. However, it has not given exhaustive categorisation of victims. The broadest categorisation of victims could be two fold -

1 Inserted by the Code of Criminal Procedure (Amendment) Act 2008

1. Victims of Distributive Injustice

2. Victims of Street Crime

The victims of Distributive Injustice are the victims of different kinds of trauma which cannot be prevented by human beings like that are caused by cancer, hurricanes, natural calamities etc. whereas the victims of Street Crime are those who suffer from unwanted trauma caused by crimes, accidents, diseases, and systemic injustices.[1] The present research focuses on the victims of street crimes who suffer injuries because of commission of crime by another person or persons. They could be further categorised like women victims, child victims etc.

As stated above, victim include witnesses. In European law, no definition of witness is provided in convention, but case law gives the term a broad meaning, describing it as an "autonomous concept". This interpretation by the European Court does not tie the definition to any specific form of words but allows for full "autonomy" or broad scope in its application. The European Council has adopted a definition of a witness as "*any person, irrespective of his/her status under national criminal procedural law, who possesses information relevant to criminal proceedings*".[2] It covers those who not only give their evidence in trial but also those who make a statement to the police only and not to any prosecution or judicial authority or who have disappeared after making an initial statement.

It encompasses witnesses for the prosecution (including complainant and co-accused) and for defence that include accused, although this is not expressly stated. While a co-accused is certainly a competent witness, it is not clear from this definition whether he or she can be compelled to give evidence. It expressly includes experts and interpreters.

There is no definition as to who constitutes a witness in international law. This can be inferred from treaties and case law that parties giving testimony in criminal proceedings are generally subject to same rules and guidelines. These parties include what we would commonly understand in domestic law as witnesses; particularly victims where they appear as witnesses in criminal proceedings and other vulnerable categories including children and those with sound mental condition. The statement given by witness helps courts to a great extent to frame the facts and circumstances of the case. It is for this

1 "Two Kinds of Victims: Meeting: Their Needs", Ruth Morris, Journal of Prisoners on Prisons Vol. 9 No. 2 (1998)

2 Recommendation R (97)13 of the committee of Ministers to member States concerning Intimidation of Witnesses and the Rights of the Defence (adopted by the Committee of Ministers on 10 September 1997 at the 600th meeting of the Ministers' Deputies)

reason that they are expected to tell the truth. It is said that witness are weighed, they are not numbered. Their evidence can only be ascertained by the statements given by them and also evidence produced by them though not in quantity but in quality. If a fact is fully proved by two witnesses, it is as good as if by a hundred[1].

The following could be the categorization of witnesses

i. Victim as a witness – The person who has suffered due to the commission of crime is called as victim. These statements are also piece of evidence and highly reliable.

ii. Child Witness – A child even of 6 or 7 years age may be allowed to testify if the court is satisfied that he has capacity to answer. A child of tender years is a competent witness when such child is intellectually.

iii. Eye Witness – Eye witness is who has personally seen something happen and so can give a first-hand description of it.

iv. Partisan or interested witness – A partisan or interested witness is one who is somehow related to the victim of crime and is interested in the conviction of the accused person. He may be relative, friend, servant or master. There is no hard and fast rule about reliability on testimony of partisan witness. It depends upon facts and circumstances of each case.

v. Evidence of Investigation officer – The evidence of investigation officer who had searched and arrested the accused pays very important role in criminal matters.

vi. Chance Witnesses – If by coincidence or chance a person happened to be at a place of occurrence when the incidence took place, he is chance witness. The evidence given by such witness is highly reliable because he is not connected to either party. But if he is related to either party then his depositions may be looked at with suspicion.

vii. Medical Officer/Expert as a witness – The Evidence Act provides that in certain cases medical examination is mandatory and Medical Officer should give his report accordingly after conducting examination. In case of post-mortem body is sent to Government Hospital to identify the cause of death.

[1] Mr. Justice Buller in Calliand v. Vaughan, 1798

Medical Officer (qualified) appointed by government accordingly issues certificate identifying cause of death.

viii. Character witness – A character witness is a witness who testifies under oath as to the good reputation of another person in the community where that person lives.

Importance of Witnesses in Criminal Trials:

The witnesses play a very important role in the criminal justice system of any country. Justice Wadhwa said, "*A criminal case is built on edifice of evidence, evidence that is admissible in law. For that witnesses are required whether it is direct evidence or circumstantial evidence*."[1]

Thus a witness is an important part in case other than accused and complainant. By giving evidence relating to the commission of an offence he performs a sacred duty of assisting the court to discover the truth. It is for this reason that the witness either takes an oath in the name of God or solemnly affirms to speak the truth. He/she performs an important public duty of assisting the court in deciding on the guilt or otherwise of the accused in the case. He submits himself to cross examination and cannot refuse to answer questions on the ground that the answer will incriminate him.[2] The witness who does not afford the Court the correct information may have to face a trial under Sec. 190 of the Indian Penal Code (IPC) and thereafter maybe penalised under Sec. 193 – 195 of IPC.

Sec. 118 of the Indian Evidence Act mentions the competency of a witness to testify as a witness is a condition precedent. A witness is a competent one when he cannot be prevented from appearing in the court and giving evidence. Competency denotes legal capacity to give evidence. A witness is said to be incompetent to give evidence when the judge is bound as a matter of law to reject his testimony.

The tendency of modern legislation has been to allow the witness to make his statements leaving the truth to be estimated by the tribunal rather than reject his testimony altogether. Thus many rules which formerly determined the competency of witnesses are now mere circumstances in weighing the credibility or reliability of witness testimony. A witness may be competent but still may not be compelled to depose before the court. Again witness who is competent may be compelled by court but law may not force him to

[1] In Swaran Singh v. State of Punjab (2000)5SCC68

[2] Committee on Reforms of Criminal Justice System, headed by Justice Mallimath, Volume I, Page 151

answer certain questions. Magistrate, lawyers, spouses etc. have right to be protected from answering certain questions when they are being examined as witness.

The crucial part played by witnesses in bringing offenders to justice is central to any modern criminal justice system, since the successful conclusion of each stage in criminal proceedings, from the initial reporting of the crime to the trial itself, usually depends on the co-operation of witnesses. Their role at the trial is particularly important, in adversarial systems, where the prosecution has to prove its case beyond reasonable doubt, by leading evidence, often in the form of oral examination of witnesses, at a public holding. In such cases, the testimony of a witness though not as an eye witness may prove to be very crucial in determining the circumstances in which the crime might have been committed.

A number of factors are responsible for the increased attention on the role of witnesses in criminal proceedings in most of the countries around world. Amongst these the two most important have been emergence of interest of victims in criminal procedure and the significant rise in terrorist activities and organised crimes.

The witnesses play a pivotal role particularly in offences pertaining security of state, drug trafficking, serious offences like murder, rape, robbery, dacoity where the imprisonment is not less than seven years and which may extend to death sentence.

There are many difficulties faced by the witnesses at various stages of investigation especially during the trial period. He may face the life threatening intimidation to himself and to his relatives. Where witness is a police informer or a police officer, further investigation and crime prevention activities may get affected due to inadequate protection provided to them.

Witnesses other than police informers and police officers face difficulties as witnesses to crime within the family or close community, witnesses to sexual offences, and other witnesses who are helpless or vulnerable for their personal reasons. The prosecution largely depends upon oral testimony of its witnesses for proving the charges beyond reasonable doubt. It is for this reason that witnesses need special protection in most of the cases.

But unfortunately, people are losing their faith in the criminal justice system as a result of which they are afraid of coming forward and offering their oral testimony in courts.

Another reason for this is that there is no law or special programme affording adequate safe guards against possible threats to either themselves or to their family members.

Condition of witnesses in India –

In India, there is no law relating to the protection of witnesses as in other developed countries as the UK, US, Canada, Australia. As a result of this the witnesses do not have any remedy in law if they are not been treated properly. The present judicial system has taken witnesses completely for granted. Witnesses are summoned to court regardless of the fact that they might not have any money or might not be able to leave their family, children, business, etc. or that it might be after many years of the incidence which the witness may not even remember at the time of actual trial. The facilities provided to witnesses in ancient Hindu law like the reasonable amount by way of conveyance, suitable environment in the Court and the respectful attitude of the officers of the courts towards the witnesses are nowhere to be found in the modern criminal justice system. It is rather the witnesses are mostly scared to come forward and testify in the court due to the adverse situations.

In the light of the existing situation, the Government felt a need to introduce the provisions in the Code of Criminal Procedure in 2008 relating to witness protection. The 2008 Amendments have included some important provisions relating to the rights of victims and witnesses. Victims who might also be a prime witness in criminal trials have been given some important rights like that of compensation. But witnesses are given superficial rights through the amendments.

Section 357A has been inserted in Code of Criminal Procedure in 2008 in order to provide for the State government to prepare, in coordination with central government, a scheme called “Victim Compensation Scheme” for the purpose of compensating the victim or his dependants who have suffered loss or injury as a result of the crime.

Further a new section 195A has been inserted in Criminal Procedure Code to provide an opportunity to the witness or any person on his behalf to file complaint in relation to an offence u/section 195A of the Indian Penal Code.

The Indian courts are overburdened with cases. Thus, it is not possible for the court to conduct the cases on a day to day basis. Sometimes there is inordinate delay in conducting a criminal trial which ultimately might lead to tampering of evidences and

threats to witnesses and their family members. Hence there was an ardent need to confer protection on witnesses during the lengthy trials.

This provision is the only provision in Indian legal system which directly relates to witness protection. Section 195A was inserted by the Criminal Law (Amendment) Act, 2005 to Indian Penal Code. It is provided that

"whosoever threatens with any injury to his person, reputation or property or to the person or reputation of any one in whom that person interested with the intent to cause that person to give false evidence shall be punished with imprisonment of either description for a term which may extend to seven years or with fine or with both.

And if innocent person is convicted and sentenced in consequence of such false evidence, with death or imprisonment for more than seven years, the person who threatens shall be punished with same punishment and sentence in the same manner and to the same extent as such innocent person is punished and sentenced."

This amendment aims at tackling the problem of hostility. The problem of hostility was endeavoured to be tackled through section 191 of IPC which treats giving false evidence on oath as an offence. The provision was not efficient as section 191 did not solve the basic reason behind hostility, which is threat to the witnesses' life or limb or family members. Now with this amendment, the witnesses instead of becoming hostile and hampering the process of administration of criminal justice can file a complaint against the persons threatening them to give false evidence which is an offence under section 195A of IPC.

This provision is inadequate in protecting the witnesses. The problem of witnesses cannot be solved unless and until the witnesses, his family members or close relatives are protected completely and in true sense.

The questions that are posed before us after analyzing this provision are firstly, whether the witnesses are protected outside the Court after filing complaint and secondly, if yes, to what extent, if no, is there a solution?

This offence under section 195A of Indian Penal Code is cognizable and non bailable. The co-relative procedure for this substantive provision is laid down in section 195A of Code of Criminal Procedure. However, this in substance does not confer any kind of protection to the witness as merely giving him an opportunity to file a complaint does not take away the threat posed to his life which persists for 24 hours. The Magistrate

potentially does not have power to secure the witnesses' life. At the most police can assure their regular attendance in the court when required. Hence, apparently the answer to our question is no because this protection which is conferred to witnesses, in reality, is merely a formality which does not address the need for witness protection. Thus it can be concluded that the Amendment has not provided an adequate relief to witnesses.

Some special enactments regarding the protection of witnesses also exist in Indian law. These were mainly in the matters that are affecting to the Government and public at large, e.g. terrorism. There were certain special statutes providing for witness identity protection like –

1. Terrorists and Disruptive Activities Act, 1985 – (TADA) – Section 13 of the Act provided for a procedure to protect the identity of a witness in a criminal trial involving the acts punishable under the Act. 1985 Act was replaced by the 1987 Act and under section 16 of the new Act the same procedure was mentioned. The validity of section 16 of the Act was uphold by the Supreme Court in *Kartar Singh v. State of Punjab*[1]
2. Prevention of Terrorism Act, 2002 (POTA) – This Act repealed TADA, 1987. Section 30 of the Act provided for in camera proceedings and witness identity protection. The validity of section 30 was challenged in *PUCL v.UOI*[2] where Supreme Court upheld its validity.
3. The Unlawful Activities (Prevention) Amendment Act, 2004 – POTA was once again repealed and the changes were brought into the Unlawful Activities (Prevention) Act, 1967. Section 44 of the Act provides for the protection of the witnesses which is identically worded with section 30 of POTA.
4. Juvenile Justice (Care and Protection of Children) Act, 2000 – Section 21 of the Act provides for protection of identity of juvenile. It provides that no report in any newspaper, magazine, news sheet or visual made of any inquiry regarding a juvenile in conflict with law shall disclose the name, address or school or any other particulars calculated to lead to the identification of the juvenile.

[1] [1994 (3) SCC 569]
[2] [(2003) 10 SCALE 967]

The provisions mentioned above are applied only in special cases and thus are inadequate. The person who becomes witness in cases of violent crimes, or other serious crimes is not covered under the purview of any other law.

Today the vulnerability of the witness is so prominent that even courts have appealed for a witness protection law. In case of *Swaran Singh v. State of Punjab*[1] Justice Wadhwa while delivering the judgement expressed his opinion about the plight of witnesses in India.[2]

Mr. Soli Sorabjee, the famous Attorney General has rightly observed that, "*Nothing shakes public confidence in the criminal justice delivery system more than the collapse of the prosecution owing to witnesses turning hostile and retracting their previous statements.*"[3]

This is the main reason now a days responsible for acquittals in criminal trials i.e. failure of prosecution due to witnesses turning hostile and a low conviction rate. It will be appropriate to mention here that all aspects relating to hostile witnesses will be dealt in one of the proceeding chapters.

Conclusion –

Law cannot be static. It has to change as per the changing needs of society. The phenomenon of hostile witnesses, a decade ago was an exception but now it has become a casual thing in celebrated cases involving the high politic citizens. For example, in cases like Neelam Katara, Jessica Lal and Best Bakery[4] etc. the key witnesses turned hostile during the actual trial resulting in dilution of trial procedure. Apparently though the reasons for hostility might be different, latently, it is the lack of proper witness protection programs in India. Today undeserving acquittals can be secured by simple means, namely, ensuring that the main witness either does not turn up or turns hostile. Though the Supreme Court has laid down that evidence of a hostile witness need to necessarily be treated as being in favour of the accused, still the court find it difficult to do so. Failure of prosecution resulting in acquittal of accused ultimately hampers process of justice and people are losing their confidence in the criminal justice system. It is due to this reason that a witness protection law and programme is needed in India. In the absence of any

[1] (2000)5SCC68 at 678
[2] See also, State of Uttar Pradesh v. Shambhu Nath Singh (2001) 4 SCC 667
[3] The Indian Express, October 26, 2003, The Columnists, Witness Protection by Soli Sorabjee
[4] National Human Rights Commission v. State of Gujarat (2009) 6 SCC 767

law or programme affording protection to witnesses, we cannot hope for the crime rate to come down. In fact it will work as a safeguard for criminals who will dare to repeat their criminal activity.

The need for witness identity protection is debated over every now and then. Many a times, protecting the identity of the witness during the trial is not sufficient and the witness and his family members may need some extra care and protection even outside the court. This is a preventive step from saving the life of the witness and his family members form the brutal consequences of becoming a witness against the accused person.

Various countries have established the Witness Protection Programmes in different countries which deals with the aspect of physical protection of witness outside the court. These programmes aim at taking care of witnesses in all spheres of life, social economic and safety of the life. The extent and the nature of this programme changes from country to country.

The Indian legal system recognises various rights conferred upon the accused person in provisions of Constitution and the Code of Criminal Procedure. Article 20 (2) and (3) of the Indian Constitution recognises the right of an accused against *double jeopardy* and right against self incrimination. Section 250 of the Code of Criminal Procedure provides for the compensation to an accused person on the ground that the person is been charged with the commission of an offence without the existence of reasonable ground.

Hence it could be concluded that when the Indian legal system could be so sensitive towards the rights of an accused, it should also be equally sensitive towards the rights of the witnesses who play a major role in administration of criminal justice.

SIGNIFICANCE OF STUDY:

According to Bentham, '*witnesses are the eyes and ears of justice*'. Any criminal justice system requires that the accused should be proved guilty in the court of law beyond any reasonable doubt. Thus a duty is casted upon the prosecution to prove such guilt with the help of direct and indirect evidences proving the guilt of the accused beyond all reasonable doubts in the minds of the Judge.

The procedure to prove an accused guilty involves many stages; one of the important stages is the production of witnesses in the court. The statement of the witnesses in such cases is very important as it has the magic force of changing the scenario of whole case. But unfortunately, in our country witnesses who include victim and the accused person himself, are not given proper importance due to which they do not feel secured in coming forward to depose in front of the Courts in India.

Due to the delay in the administration of justice and inadequate recognition, allowances and protection of witnesses most of the times witnesses are not ready and willing to participate in the process of law. They show the disinterest in giving information to police authorities due to the fear in their mind that they may be called as witnesses in the Court.

There are many incidences where the witnesses have given their testimony which is ambiguous and would be of no help in determining the guilt of the accused.

In other instances witnesses have turned hostile or have disappeared totally on account of reasons mainly threat to their life or family members or the trauma faced by the victims and the witnesses. In order to deal with the problem of hostile witness certain changes were recommended by Law Commission of India and were incorporated in the Criminal Procedure Code. But the situation has not yet improved and the witnesses turning hostile have become a rule in almost every important criminal trial.

The Hon'ble Supreme Court observed that witnesses tremble on getting summons from Courts in India, not because they fear the examination or cross examination but because of the fear that they might not be examined for the several days together.[1]

[1] State of Uttar Pradesh v. Shambhu Nath Singh (2001) 4 SCC 667

The problem of witnesses turning hostile is the major reason of the reduction in the conviction rate and thereby the criminals are not been punished. They are committing crimes recurrently resulting in the disturbance of peace and order in the society.

The situation relating to witnesses is getting worse day by day. But neither the Union of India nor any State government has framed any law or even a scheme for protecting the witnesses.[1]

It is therefore, the need of the hour to come up with a legislation protecting witnesses in criminal trials in India

[1] National human Rights Commission v. State of Gujarat (2003) 9 SCALE 329

OBJECTIVES OF THE STUDY

The objectives of the study are:

1) To analyse and discuss the rights of accused vis-à-vis the witness protection

2) To study and critically evaluate the Law Commission's Report, 2006 on Witness Protection.

3) To examine the existing Legislative provisions relating to witness protection in India

4) To interpret and analyse the judicial decisions in respect of witness protection

5) To make a comparative analysis of the laws relating to witness protection in various other countries

6) To evolve and suggest a model scheme for witness protection in violent crimes and to analyse the role of society in witness protection.

HYPOTHESIS/RESEARCH PROBLEMS

1) The rights of the accused person relating to a fair and open trial are mentioned in various International documents relating to Human Rights like Universal Declaration of Human Rights and International Covenant on Civil and Political Rights, but it has failed to recognise and mention the need and importance of witness protection that might result in the failure of criminal justice system.

   Are accused better protected than witnesses in International Instruments?

2) The Law Commission of India has prepared a report on the witness protection programme and the Witness Identity Protection Bill. But there are still some major drawbacks in the draft which needs to be taken care of.

   Whether the Law Commission's report on witness protection programme and the Witness Identity Protection Bill exhaustively and effectively deals with witness protection?

3) In India there were very few Statutes like POTA and TADA that provided for witness protection. Most of these Statutes are repealed and currently there is only one Statute i.e. Unlawful Activities (Prevention) Act 2004 that provides for witness protection. Therefore, it is desired to have a special law in respect of the protection of witnesses in violent crimes.

   Is there a need of a special law in respect of protection of witnesses in violent crimes?

4) The Indian judicial system, in various decisions, has recognised and emphasised the need of the special law relating to witness protection. The Court has also been instrumental in laying down the guidelines for the same. These guidelines which could be helpful in formulating a better witness protection program.

Whether the guidelines laid down by Indian Supreme Court could be relied while formulating the witness protection program?

5) The developed countries like United States of America, Great Britain and developing countries like Philippines have witness protection programmes and those are implemented in cases of violent crimes as well. It is important to make a comparative analysis of the provisions incorporated in these laws and their relevance in Indian situation.

   Could witness protection programs instituted in other developed and developing nations be helpful in framing the witness protection program for India?

6) It is possible to evolve a model scheme for witness identity protection and physical protection in violent crimes and involvement of society in witness protection.

   Whether India needs a special scheme for witness protection in violent crimes? Does society have a role to play in witness protection?

LITERATURE REVIEW

In 2003 the Malimath Committee while submitting its report on the Reforms in Criminal Justice System observed that our criminal justice system is about to collapse as the common people are losing their faith in the system. The committee has attributed many factors to it like the delay in proceedings and backlog of cases etc.

The committee pointed out that our system emphasis strongly upon the rights of accused person before, during, and after the trial. The criminals are not afraid of committing crime as they are sure of getting scot free from the clutches of law. The committee also mentioned about witnesses but it did not emphasise upon the aspect of witness protection in India.

The Constitution of India provides important safeguards for the protection of rights of accused. The Code of Criminal Procedure provides for procedural safeguards to the accused person like fair trial, right to consult, right to cross examine and right to compensation in case of false allegations etc.

The basic object of the criminal justice system is to protect the society against the crime and punish the offenders. But unfortunately, the criminal justice system does not show equal concern to the victims of crime. Traditionally, the claims of the victims were sufficiently satisfied by conviction and sentence of the offenders. Very few provisions could be found in respect of the victim is in the Code of Criminal Procedure providing for compensation to victims or *in camera* trials for the victims of sexual offences etc. But in today's time it is felt that in order to achieve the true success of the criminal justice system is not only the reformation of the offender but the restoration of justice to the victims of the crime. One of the most important aspects of this is the protection of the victim and even the witnesses who play a vital role in the administration of justice. This protection can be provided in various manners by awarding the compensation or physically protecting them from the possible threats to their life, property and the safety of their family members.

The Law Commission in its 198th Report has suggested comprehensive `Witness Identity Protection' and `Witness Protection' programmes to prevent witnesses from turning

hostile under threat from the accused and to ensure that criminal trials do not end in acquittals. However, the report has not exhaustively dealt with the problems of witnesses.

B. Guru Rajah Rao, '*Ancient Hindu Judicature*'[1], talks about the ancient judicial system. The book has given a detailed account of the ancient legal system in India which covers the administration of justice in civil and criminal matters. The legal system as existed in early Hindu law and middle period i.e. Mohammedan law relating to witnesses was established in a way that would arouse confidence and faith in the minds of not only the victims but also witnesses and the accused persons. The treatment that was been given to witnesses in the Courts might be one of the reasons that could have attracted the witnesses to participate in the administration of criminal justice. The book is of great help in finding out the success of ancient criminal justice system.

The aspect of compensation to accused persona and even to the victims is been dealt with by the Indian legislature through various statutory provisions, though, the witness protection has remained as overlooked.

A. K. Sarkar and S.K. Awasthi in the book "*Oral and Documentary Evidence (Civil and Criminal)*[2]*"* has discussed exhaustively various kinds of witnesses and the rules relating to their testimony.

Hon'ble Justice Mr. B. Sudershan Reddy in his book '*Law on Compensation*'[3] has dealt with the various aspects of protection of rights of victims and accused persons through compensation covering international perspective of law of compensation. But he has failed to mention about the idea of compensation to witnesses.

Dr. Avatar Singh in his book *"Principles of the Law of Evidence*[4]*"*and Vepa P. Sarthi in *"Law of Evidence*[1]*"* has discussed in detail the various aspects of the law relating to testimony of witnesses.

[1] Ganesh & Co., Madras, 1920
[2] 2001, 2nd Edition, Ashoka Law House, New Delhi
[3] Deep & Deep Publications, New Delhi, 2002
[4] 2007, 16th Edition, Central Law Publication

Prof. A. Laxminath and Dr. J. Krishna Kumari in their book '*Criminal Trial and Justice'*[2] have referred to the various aspects of compensation to victims, making it a statutory right. They have referred to the definition of victim adopted by United Nations General Assembly in Article 1 and 2 of its resolution 40/34 of 29th November 1985.

As per the definition, the term victim includes where appropriate, the immediate family or dependents of the direct victims or persons who have suffered harm in intervening to assist victim in distress or to prevent victimisation. It does not include witness. The authors have concluded by pointing out that Indian Judiciary has raised to the occasion by introducing the compensation to victims of crime as integral and main component of sentencing process as a social defence system.

Mr. A. Hariprasad in his article '*Witness Protection – Bird's Eye View'*[3], pointed out that unceremonious acquittals in sensational criminal cases is due to lack of witness protection, who comes forward to depose before a court with full sense of duty and conviction. The author has referred to the various decisions of the Supreme Court and has compared the witness protection in the international perspectives. The author has suggested some very important suggestions but has not given a complete scheme of the programme for witness protection.

Justice Madan B. Lokur of Delhi High Court in his article on *'Access to Justice: Witness Protection and Judicial Administration'* has mentioned the problems faced by witnesses during trial and thus by the justice delivery system. He has referred to guidelines issued by the Delhi High Court for the purpose of witness protection in all possible ways, given to crucial witnesses so that offenders are successfully brought to the justice. He has discussed the contribution made by the Law Commission of India relating to witness protection.

After analysing the various cases and statutes he concludes that various reports, isolated provisions and sporadic cases do not provide sufficient workable measures for witness protection and comprehensive scheme.

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[1] 2008, 6th Edition, Eastern Book Depot

[2] Alt Publications, Hyderabad 2003

[3] Director, Kerala Judicial Academy, 2006(1) J.V.

Mr. H. Suresh in his article *'New Law Needed to Protect Witnesses'* has observed that in many cases involving rich and influential persons or corrupt government officials or politicians, crucial witnesses turn hostile making the rule of law a mockery. He referred to the European Commission's laws and other International Instruments dealing with the witness protection. While referring to the tragedy of Gujarat carriage he concluded that there is a great need of a bill of rights to preserve and protect the victims and the witnesses.

Justice Jagannadha Rao in his article on *'Witness Protection – Rights, Needs and Benefits Required to Ensure Effective Victim Testimony'* has observed that victims of a crime play important role in the administration of justice. But in spite of important component of the criminal justice system, much attention had not been paid to the rights of victims. He has referred to Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. The definition mentioned in the Declaration of victims includes witnesses.
He mentioned that if witnesses are incapacitated from acting as eyes and ears of justice, the trial judge gets petrified and paralysed and can no longer constitute a fair trial.

SCOPE OF THE STUDY

Crime is an inevitable phenomenon in any society. Thus every society seeks to limit the occurrence of such phenomenon and penalises the person responsible for it. The person accused of a commission of a crime is presumed innocent unless proved guilty beyond reasonable doubt and thus is entitled to a fair trial. Witnesses play an important role in deciding the guilt or the innocence of the accused person. It is however, important to protect the witnesses from the threats which they might get for the reason of being a witness from either side.

The present research work seeks to study, discuss and analyze the problems faced by the witnesses during a criminal trial relating to violent crimes in Indian scenario. It also seeks to discuss the schemes and programs for witness protection in violent crimes. Crime and its components being a global phenomenon, the research work is limited only to the trials of violent crimes in India.

RESEARCH METHODOLOGY

The research will be carried on through the doctrinal research by following the various approaches in it.

a. Historical process
b. Evaluation process
c. Legislative process and its analysis
d. Collative process

The present research will be done on the basis of the text books, articles published, judgments, various reports of the committees and commissions, law journals, legislations in India and the legislations in other countries and news paper articles.

SCHEME OF THE RESEARCH

I. Introduction

The entire study is divided into eight chapters with different dimensions of the problem. The first chapter covers the introductory part consisting of significance of the problem including methodology followed by hypothesis/research problems, literature review and plan of study.

II. Origin and Development of Role of Witness in Criminal Trials

Second Chapter broadly deals with the origin and historical progressive jurisprudence regarding role of witnesses in ancient times, medieval times and in modern law.

III. International Parameters in relation to Protection of Witnesses

Third Chapter covers various instruments at International level dealing with the Witness Protection. It also deals with an overview of the legal provisions relating to witness protection in various developed as well as developing countries.

IV. Constitutional Mandate and Legislative Activism

The Fourth Chapter broadly deals with the various Constitutional Provisions guaranteeing the rights to an accused person vis-à-vis the rights of witnesses. It also covers analysis of various Legislations enacted in India dealing with the Witness Protection.

V. Witness Protection in Criminal Matters in India

Fifth Chapter seeks to analyse the role played by various Criminal Justice agencies in protection of the witnesses during the criminal trials, like the executive i.e. police authorities, prosecution and the judiciary.

VI. Role of Society and Witness Protection

Sixth Chapter tries to analyse the role played by the society at large in securing the protection of witnesses during a criminal trial. The Chapter seeks to analyse the participation and the role of various Non Governmental Organisations in implementation of the witness protection programs.

VII. Judicial Positivism and Witness Protection in India

Seventh Chapter seeks to analyse the role of judiciary in protection of the witnesses during the trial. The various judgments and the guidelines and recommendations given by the High Courts and the Supreme Court in respect of the provisions relating to witness protection from various legislations like TADA and POTA.

VIII. Conclusion and Recommendation

Eighth Chapter brings out the conclusion and suggestions with the hope that they may be useful to the Legislature in enacting an updated and wholesome law, to the Executive for its proper implementation and to the judiciary for executing them with effective decision making to meet the ends of justice.

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